No. 14-60800

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MURPHY OIL USA, INC.,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
12-CA-25764

MOTION FOR LEAVE TO FILE
BRIEF OF AMICI LABOR LAW SCHOLARS
IN SUPPORT OF RESPONDENT-CROSS PETITIONER NLRB

Pursuant to Local Rule 29.1, the putative amici ask for leave the file an brief in this case.

The putative amici are teachers and scholars of labor and employment law. All of the putative amici have conducted research and published articles on the specific question at issue in this case – whether an employer can impose, as a condition of employment, an agreement under which employees waive their right to proceed collectively in the enforcement of their employment rights both in court and in arbitration.

The putative amici believe that their brief will be of assistance to the Court because it addresses a critical issue only briefly discussed in the Brief of Respondent-Cross Petitioner NLRB (at 21, 35), which focuses largely on the National Labor Relations Act, 29 U.S.C. §§ 141 et seq. The amicus brief focuses exclusively on the application of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq., to the question before this Court, arguing that its text, history and underlying policy all preclude enforcement of the agreement at issue, thus supporting if not compelling the conclusion that the agreement violates the NLRA.

The information concerning Norris-LaGuardia presented in the amicus brief is key to evaluating the holding of the Board below because while the Board's decision was primarily based on the NLRA, its decision in this case and the prior case of *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), also rested on Norris-LaGuardia. This is true in three respects.

First, the Board concluded that agreements of the type at issue here conflict with the policy announced in Norris-LaGuardia and are thus unenforceable in the federal courts. In *D.R. Horton*, the Board concluded:

> Consistent with the terms and policy of the Norris-LaGuardia Act, an arbitration agreement imposed upon individual employees as a condition of employment cannot be held to prohibit employees from pursuing an employment-related class, collective, or joint action in a Federal or State court. Such a lawsuit would involve a "labor dispute" under Section 13 of the Norris-LaGuardia Act: a "controversy

> concerning terms or conditions of employment." The arbitration agreement, insofar as it sought to prohibit a "lawful means [of] aiding any person participating or interested in" the lawsuit (Sec. 4) such as pursuing or joining a putative class action--would be an "undertaking or promise in conflict with the public policy" of the statute (Sec. 3). [357 NLRB No. 184 at 6.]

See also Murphy Oil USA, Inc., 361 NLRB No. 72 at 6, 16 (2014).

Second, the Board held that the policy announced in Norris-LaGuardia must inform the construction of the NLRA and bolsters, if it does not compel, the conclusion that these agreements violate the NLRA.

> Modern Federal labor policy begins not with the NLRA, but with earlier legislation, the Norris-LaGuardia Act of 1932, which aimed to limit the power of Federal courts both to issue injunctions in labor disputes and to enforce 'yellow dog' contracts prohibiting employees from joining labor unions. Thus, Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity since before passage of the NLRA. [357 NLRB No. 184 at 6.]

Moreover, the Board observed, "The NLRA, passed in 1935, built upon and expanded the policies reflected in the Norris-LaGuardia Act, echoing much of the language of the earlier law." *Id*.

Third, the central counterargument advanced by Petitioner-Cross Respondent Murphy Oil is that the Board's decision is contrary to the Federal Arbitration Act (FAA). But if Norris-LaGuardia bars enforcement of the

agreement in federal court, as the amicus brief demonstrates, then it falls within the savings clause of the FAA:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*. [9 U.S.C. § 2 (emphasis added).]

Thus the information contained in the amicus brief is critical to evaluating both the NLRB's arguments under the NLRA and Murphy Oil's counterarguments under the FAA.

The brief presents relevant, historical materials that might not otherwise be available to the Court.

The brief addresses an issue not analyzed by the prior panel decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). *See id*. at 362 n. 10.

Respondent-Cross Petitioner NLRB has consented to the filing of this brief. Petitioner-Cross Respondent Murphy Oil has not consented to the filing of the amicus brief. Counsel for the putative amici requested consent but it was declined. Counsel for Murphy Oil did not indicate whether he intends to file a response to this motion.

The case has not yet been scheduled for oral argument.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that a true and correct copy of this Motion for Leave to File was served on Petitioner's counsel, Jeffrey A. Schwartz and Danield D. Schudroff, Jackson Lewis; NLRB counsel, Kira Dellinger Vol and Jeffrey William Burritt; and Intervenor's counsel, Glen M. Connor and Richard P. Rouco, Quinn, Connor, Weaver, Davies & Ruocco via the Court's electronic filing system and by email and that the brief was filed both via the Court's electronic filing system and by first class U.S. Mail this 8th day of April 2015.

/s/ Hal K. Gillespie
Hal K. Gillespie
Attorney for Amici Labor Law Scholars